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In The
Supreme Court of the United States
October Term, 1989

EDDIE KELLER, *et al.*,

Petitioners,

v.

STATE BAR OF CALIFORNIA, *et al.*,

Respondents.

On Writ Of Certiorari To The
Supreme Court Of California

**AMICUS CURIAE BRIEF OF THE STATE BAR OF
MICHIGAN AND THE SOUTH CAROLINA BAR
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS

The State Bar of Michigan is a public body corporate; its membership consists of all persons who are now and may be hereafter licensed to practice law in the State of Michigan. Mich. Comp. Laws Sec. 600.901;¹ Rules of the

¹ Mich. Comp. Laws Sec. 600.901: "The state bar of Michigan is a public body corporate, the membership of which consists of all persons who are now and hereafter licensed to practice law in this state. The members of the state bar of

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Supreme Court Concerning the State Bar of Michigan, Rules 1 and 2.² The South Carolina Bar is an organization of all persons who are licensed to practice law in South Carolina, created by and with purposes and duties established by the Supreme Court of South Carolina.³ All

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Michigan are officers of the courts of this state, and have the exclusive right to designate themselves as 'attorneys and counselors,' or 'attorneys at law,' or 'lawyers.' No person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto."

² Rule 1. STATE BAR OF MICHIGAN. "The State Bar of Michigan is the association of the members of the bar of this State, organized and existing as a public body corporate pursuant to powers of the Supreme Court over the bar of the State. The State Bar of Michigan shall, under these rules, aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this State."

Rule 2. MEMBERSHIP. "Those persons who are licensed to practice law in this State on December 2, 1935, and those who shall become licensed thereafter to practice law in this State, shall constitute the membership of the State Bar of Michigan subject to the provisions of these rules. . . ."

³ S.C.Sup.Ct.R.48. SOUTH CAROLINA BAR. "(A) Name. There is hereby created and established an organization to be known as the South Carolina Bar.

"(B) Purpose. The purposes of the organization shall be to uphold and defend the Constitution of the United States and the Constitution of the State of South Carolina; to protect, and maintain respect for, representative government; to continually

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active members of the State Bar of Michigan are required to pay dues pursuant to Rule 4, Supreme Court Rules Concerning the State Bar.⁴ All members of the South

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improve the administration of justice throughout the State; to require the highest standards of ethical and professional conduct, and uphold the integrity and honor of the legal profession; to advance the science of jurisprudence; to promote consistent high quality of legal education and legal services to the public; to apply the knowledge, experience and ability of the legal profession to the promotion of the public good; to encourage goodwill and respect for integrity and excellence in public service among the members of the legal profession and the public; to perform any additional purposes and duties assigned to it by the Supreme Court of South Carolina; to promote and correlate such policies and activities of the Bar organization as fall within these purposes in the interest of the legal profession and of the public.

"(C) Duties and Powers. (1) The duties of the South Carolina Bar shall be to faithfully carry out its stated purposes as set forth in these rules as may be amended from time to time, with such powers as shall be reasonably necessary and proper for the carrying out of these purposes, including the power to adopt, and amend as necessary, the By-Laws by which it shall be governed, to establish classification of memberships, to recommend amendments or additions to these rules and to the Constitution approved by this Court to be effective upon formation of the South Carolina Bar, and to recommend changes in the license fees to be charged the members thereof. (2) . . .

"(D) Membership. No person shall engage in the practice of law in the state of South Carolina who is not licensed by this Court and a member in good standing of the South Carolina Bar except as otherwise provided in the rules of this Court."

⁴ Rule 4. MEMBERSHIP DUES. "(a) An active member's dues for each fiscal year (October 1 through September 30),

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Carolina Bar are subject to the payment of annual license fees pursuant to the South Carolina Supreme Court Rule 48(C)(2),⁵ and all categories of membership are required to pay annual license fees except the categories of "Senior Members" and "Retired Members."

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payable at the State Bar's principal office by October 1 of each year, are \$200. However, for the fiscal year of admission, dues are \$100 for a member admitted between April 1 and September 30.

"(b) Dues notices must be sent to all active members before September 20. A 10 percent late charge is added to a dues payment postmarked after November 30. The State Bar must send a written notice of delinquency (by registered or certified mail to the last recorded business address) to a member who fails to pay his dues by November 30. If the dues and the late charge are not paid within 30 days after the notice is sent, the individual is suspended from active membership in the State Bar. If an individual is not subject to a disciplinary order and the suspension is for less than 3 years, he is automatically reinstated on the payment of dues and late charges owing from the date of his suspension to the date of his reinstatement. If the suspension is for 3 years or more, the individual must also apply for recertification under Rule 8 for the Board of Law Examiners.

"(c) . . .

"(d) . . .

"(e) All dues are paid into the State Bar treasury and constitute a fund to pay expenses authorized by the Board of Commissioners."

⁵ S.C.Sup.Ct.R.48. SOUTH CAROLINA BAR. "(C) Duties and Powers. (1) . . .

"(2) The annual license fee for active members who have been members of the Bar for five (5) years, or more, shall be

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The issue before the Court of concern to the State Bar of Michigan and the South Carolina Bar is the extent to which the mandatory dues of a unified bar can be used to support the organization's limited advocacy in furtherance of its state-designated purpose to promote improvements in the administration of justice and advancements in jurisprudence.

In furtherance of that mandate, the State Bar of Michigan and the South Carolina Bar have established committees and sections whose jurisdictions involve the ongoing review of the relevant substantive law. They evaluate proposals for change in the law and occasionally recommend to the policy-making bodies of the state bar those they believe should be supported or resisted. Sometimes they themselves develop proposed statutes and court rules and recommend that the state bar advocate their enactment. Positions ultimately adopted by the state bar's policy-making entities are advocated to the governmental bodies which have jurisdiction. These advocacy

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One Hundred and Forty (\$140.00) Dollars per year. The license fee for all other members shall be in such lesser amounts as may be provided for in the By-Laws of the South Carolina Bar. The license fee shall be payable on or before January 1st of each year to the Treasurer of the South Carolina Bar, provided, however, that in the year 1975 all dues shall be due and payable on or before April 1, 1975. All such license fees shall be handled pursuant to the procedures set forth in Section 40-5-30, South Carolina Code of Laws, 1976. All income and assets, other than such license fees, may be handled separately by the South Carolina Bar, as prescribed in its Constitution and By-Laws."

activities on the part of the State Bar of Michigan and the South Carolina Bar may be directly affected by the Court's decision in this case.

The State Bar of Michigan and the South Carolina Bar file this *amicus curiae* brief in support of Respondents State Bar of California, *et al.* Consent of the parties has been obtained and is on file with the Clerk of the Court.

STATEMENT OF THE CASE

This action is brought by licensed California attorneys to enjoin the use of mandatory bar dues to fund legislative advocacy and other activities Petitioners label "ideological and political."

SUMMARY OF ARGUMENT

The issue before the Court is the constitutionality of the use of a portion of a unified bar member's mandatory dues to fund the organization's advocacy activities in furtherance of its state-designated purpose. The test for determining constitutionality in these circumstances requires a balancing of the degree of the infringement of the individual member's rights against the importance of the state's interest in the compelled activity. Applying this test to the facts of this case demonstrates that the infringement is relatively minimal while the state's interest is great. Therefore, the state action passes constitutional muster.

ARGUMENT

I. THE TEST TO DETERMINE CONSTITUTIONALITY IN "NEGATIVE" FIRST AMENDMENT CASES REQUIRES A BALANCING OF THE INJURY TO THE INDIVIDUAL AGAINST THE GOVERNMENT INTEREST IN THE COMPELLED ACTIVITY

This case involves the claim that First Amendment rights are infringed when a portion⁶ of mandatory unified state bar dues are used to fund limited advocacy by the organization because some lawyer members may prefer not to speak at all or may favor a different message.

This Court has addressed claims of such so-called "negative" First Amendment rights in various settings. In *West Virginia State Bd. of Education v. Barnette*, 319 US 624 (1943), the Court held that the First Amendment rights of school children were impermissibly infringed by a school rule "compelling speech" through the daily recitation of a specific message, the pledge of allegiance. In *Wooley v. Maynard*, 430 US 705 (1977), the Court held that the First Amendment rights of automobile owners were impermissibly infringed by state law compelling the display of an automobile license plate which communicated a specific slogan with which the owner disagreed. In *PruneYard Shopping Center v. Robins*, 447 US 74 (1980), the Court held that the First Amendment rights of shopping center

⁶ The member's pro rata share of the funds devoted directly to legislative advocacy by the State Bar of Michigan in its current fiscal year amounts to less than 3% of dues. Approximately 3% of license fee revenues to the South Carolina Bar were devoted directly to legislative advocacy during fiscal year 1988-1989.

owners were not impermissibly infringed by allowing citizens to demonstrate on shopping center property because there was little likelihood that the views of the demonstrators would be attributed to the store owners. In *Railway Employees Department v. Hanson*, 351 US 225 (1956), the Court held that a federal law compelling financial support of a collective bargaining unit by all who share in the benefits of its advocacy does not impermissibly infringe the First Amendment.

In these "negative" First Amendment cases the Court has determined the constitutionality of the challenged state action by balancing the severity of the injury to the individual against the magnitude and importance of the government interest sought to be served by the requirement or regulation. The Court has not applied the strict scrutiny test developed in other First Amendment cases involving government action prohibiting speech.

Application of the balancing test involves a three-step inquiry. (1) Does the government action infringe a protected interest of the individual member? (2) If so, what is the severity of the member's injury, how strongly is the individual linked to the compelled expression? (3) Does the government interest outweigh the injury?

II. USE OF COMPELLED DUES TO FURTHER LEGISLATIVE ADVOCACY BY A UNIFIED BAR RESULTS IN SOME INFRINGEMENT OF A MEMBER'S FIRST AMENDMENT RIGHTS

This Court has held that a lawyer may be compelled to be a member of a state bar and to pay dues to support bar activities (other than legislative activities with respect

to which the record was inadequate), noting that this compulsion has no meaningful consequence other than the payment of dues since the member is free not to participate in any of the organization's activities. *Lathrop v. Donohue*, 367 US 820 (1961); see also, *Levine v. Heffernan*, 864 F.2d 457 (7 Cir. 1988), *cert den*, 58 USLW 3187 (October 3, 1989). But because the use of compelled dues to further legislative advocacy by a unified state bar involves financial support for a form of expression, the First Amendment rights of an objecting member are implicated. *Falk v. State Bar of Michigan*, 418 Mich 270, 342 NW2d 504 (1983).

III. THE INFRINGEMENT OF THE MEMBER'S FIRST AMENDMENT RIGHTS IS RELATIVELY MINIMAL

Unlike the specific preordained messages the state required the individual to convey in *West Virginia State Bd. of Education v. Barnette*, *supra*, (the pledge of allegiance), and in *Wooley v. Maynard*, *supra*, ("Live Free or Die"), the lawyer member of a unified bar is not compelled to personally advocate any message. The individual lawyer member remains free to advocate whatever position the lawyer personally favors and to appear before the very same governmental entities to which the organization advocates its positions and oppose them.

Nor is the lawyer member personally identified with the message communicated by the state bar in the course of its advocacy. Just as this Court concluded no reasonable person would ascribe the views of demonstrators to the owners of a shopping center on whose premises the advocacy took place, *PruneYard Shopping Center v. Robins*,

supra, no reasonable person aware of the position advocated by the organization would conclude that it is the view held by every individual member. In *PruneYard*, the Court rejected the shopping center owners' claim that their First Amendment rights of nonassociation were violated by the peaceful distribution of flyers on their property, noting that the content of the speech was not prescribed by the government and that the owners were free to disavow the views expressed. Similarly, the member of a unified bar remains free to disavow, and indeed to oppose, the positions advocated by the organization.

The support of legislative activity through a portion of compelled dues by the member of a unified bar is content neutral. No position or message is preordained. In fact, the lawyer member is free to participate in the election of representatives to the governing bodies of the organization who determine its positions, as well as in the process by which those bodies determine the positions which are to be advocated. The lawyer member may even seek election to the unified bar's policy-making entities.

IV. THE STATE INTEREST IN PROMOTING THE ADMINISTRATION OF JUSTICE AND ADVANCEMENTS IN JURISPRUDENCE OUTWEIGHS THE INJURY TO THE RIGHTS OF THE INDIVIDUAL RESULTING FROM THE USE OF A PORTION OF COMPELLED DUES TO SUPPORT LEGISLATIVE ADVOCACY

This Court has held in circumstances in which the opportunities for the individual to be heard are far more limited than those present here that requiring financial

support for organizational advocacy to further important state interests does not violate the First Amendment rights of the payors. In reliance upon the governmental interest in labor peace, the Court has upheld the constitutionality of an "agency shop" arrangement wherein every public sector employee is compelled to financially support the collective bargaining activities of the union certified to represent the employees. These bargaining activities intended to influence government policy unquestionably implicate First Amendment rights. The positions advocated by the union may not be shared by those compelled to financially support their assertion and may even directly conflict with their personal best interests.⁷ Moreover, the non-member employee has no vote in electing the union representatives who will conduct the bargaining process; has no formal standing to be heard concerning the union's bargaining position; cannot seek election or appointment to the bargaining team; has no direct access to the governmental entity to advocate personal positions; and has no right to vote on the ratification of any contract proposal that results from the negotiation process. Nevertheless, compelled funding of these activities has been held to pass constitutional scrutiny. *Abood v. Detroit Board of Education*, 431 US 209 (1977); *Railway Employees Department v. Hanson*, *supra*; *International Association of Machinists v. Street*, 367 US 740 (1961).

⁷ The employee could, for example, be compelled to financially support negotiations seeking an in-county residency requirement for employment, even though the employee lives outside the county. Or the compelled financial support could be used to negotiate the exchange of a fringe benefit which is particularly useful to the employee for one which is not.

The governmental interests in improving the administration of justice and advancing the jurisprudence of the state is at least as great as the interest in labor peace. These are fundamental interests of government; indeed, they are the essence of government. Lawyers are the laborers who further that interest.

The unique role that lawyers play and the consequent interest in their regulation by the state has been noted by this Court:

"The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and historically have been 'officers of the court.' "

Goldfarb v. Virginia State Bar, 421 US 773, 792 (1975). No other trade or profession is as "essential to the primary governmental function of administering justice." *Hoover v. Ronwin*, 466 US 558, 569, n.18 (1984).

Many states have concluded that promoting improvements in the administration of justice and advancements in jurisprudence require the compelled support of all members of their bars.⁸ Justice Boyle of the Michigan Supreme Court noted:

"There can be little doubt that the government has an interest in receiving the input of the State Bar into the legislative process. The State Bar is, of course, made up of lawyers whose business necessarily entails knowing, understanding, utilizing, and interpreting the law.

⁸ Of the 50 states, the District of Columbia and the Commonwealth of Puerto Rico, 34 have unified bars most of which have statements of purpose relating to support for improvements in the administration of justice and the law.

"In this sense, the State Bar is quite different from the labor union involved in *Abood*, *supra*. It is true that the government might have a keen interest in the legislative participation of a labor union in specialized areas of the law touching directly on the field of employment of the union members or on the area of collective bargaining. But lawyers are involved with the law in almost all its forms. Therefore, their input is of broader interest to the Legislature.

"In addition, the bar brings its collective experience in working with the law to the lobbying efforts and technical advice it offers the Legislature. Certainly, the Legislature is greatly aided by the collective wisdom of the practitioners who make up the Taxation Section of the bar when it revises state taxation provisions. Similarly, the input of the Criminal Law Section is invaluable to the Legislature in its task of revising Michigan's Criminal Code."

Falk v State Bar of Michigan, 418 Mich 270, 297, 342 NW2d 504, 514 (1983).

The state's conclusion that compelled financial support of advocacy activities seeking to promote improvements in the administration of justice and advancements in jurisprudence by the members of its bar furthers its vital interest is surely as constitutionally tolerable as the similar conclusion that compelled support of collective bargaining activities furthers the state's interest in labor peace. That is particularly so, given the state's even more fundamental interest in the administration of justice and the evolution of its jurisprudence and the less intrusive infringement of the First Amendment rights of individuals compelled to contribute to the unified bar.

CONCLUSION

For the reason stated, the judgment below should be affirmed.

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